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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GEOFFREY DAVID MCCALLA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petitioner for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case is an appeal from the Ninth Circuit Court of Appeals which denied the Petitioner's Motion to Dismiss which was founded on the premise that the Respondent, United States of America, did not have federal jurisdiction to prosecute the Petitioner under Title 18 United States Code, section 2251(a). Did the Ninth Circuit err in holding that the United States did have federal jurisdiction to prosecute the Petitioner?

PARTIES TO THE PROCEEDINGS

The caption of the case contains the name of all the parties.

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INTRODUCTION

Petitioner Geoffrey David McCalla respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit Court of Appeals' decision affirming the district court's denial of Petitioner's motions to dismiss is reported at *United States v. McCalla*, 545 F.3d 750. *See* App. A1-14. The district court did not issue a written opinion in denying either of Petitioner's motion to dismiss but both issues came before the Ninth Circuit under terms of a conditional plea agreement. App. A1, 2, 3-4.

STATEMENT OF JURISDICTION

Petitioner was charged with 18 U.S.C. §§2251(a), (e) for taking photographs of a minor while she was naked and 18 U.S.C. §2252A (a)(5)(B) for possession of child pornography. App. A4. Petitioner entered a conditional plea of guilty to 18 U.S.C. §2251(a) on January 5, 2007. App. A4-5.

The decision of the Ninth Circuit Court of Appeals affirming the denial of Petitioner's August 11, 2007, motion to dismiss was entered September 24, 2008. This Court has jurisdiction under 28 U.S.C. § 1254. Jurisdiction in the district court was based on

18 U.S.C. §3231. Jurisdiction of the court of appeals is based on 28 U.S.C. §1291.

CONSTITUTIONAL PROVISIONS

The Commerce Clause of the United States Constitution, Article I, §8, cl. 3, provides "The Congress shall have power...[t]o regulate Commerce...among the several States."

STATEMENT OF THE CASE

A. Facts Giving Rise to the Case

Federal authorities initially contacted the Petitioner in December, 2005. App A2. Agents from Immigration and Customs Enforcement ("ICE") were investigating Petitioner's possible use of a child pornography website. *Ibid.* ICE eventually found images on child pornography on the computer at Petitioner's workstation. App. A2-3. ICE obtained a warrant to search Petitioner's home for additional images.

On December 18, 2005, Petitioner was arrested by the Los Angeles Police Department ("LAPD") on alternate charges for

possession of child pornography. App. A2. ICE eventually found several images of child pornography on Petitioner's home computer and media storage items including CDs. *Ibid.*

It was found that during the period from January 2003, to approximately September 2004, Petitioner began taking sexually explicit photographs of a friend's five year-old step-daughter ("Minor") with a digital camera produced in Japan. App. A4.

Following Petitioner's arrest and discovery of these images, a federal grand jury returned a two-count indictment; Count One charged the production of child pornography in violation of 18 U.S.C. § 2251(a), (e); Count Two charged possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). App. A3.

B. The District Court Proceedings

Petitioner filed his first motion to dismiss based on lack of jurisdiction on August 11, 2006. The hearing on the motion took place September 25, 2006. At that hearing, the district court entered an order denying Petitioner's motion to dismiss. *Ibid.* The District Court rejected Petitioner's argument contending that the Commerce Clause did not grant authority to regulate local production of child pornography in light of *Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) stating that "the Ninth Circuit would now take the position that this statute is

valid." App. A3. The motion was, thusly, overruled.

On November 27, 2006, Petitioner filed a second motion to dismiss for lack of jurisdiction on the basis that federal territorial jurisdiction was absent. App. A4. The District Court also denied this second motion to dismiss. App. A3.

On January 5, 2007, Petitioner entered a conditional guilty plea under 18 U.S.C. §2251(a) to Count One of the Indictment to possession of depicting child pornography conditioned on his ability to appeal the denial of his motion dismiss for lack of jurisdiction filed on or about August 11, 2006. App. A3.

The Government stated that their basis for federal jurisdiction for the production charge was that "defendant used a Sony digital camera that had been manufactured in Japan and transported in interstate commerce and foreign commerce to California." App. A3.

There was no evidence, nor was there any suggestion that Petitioner had attempted to or had actually transmitted or sold any of the images in question. Petitioner's use of a computer was not subject to the conviction due to the dismissal of Count Two of the Indictment subject to Petitioner's conditional guilty plea. Petitioner was then sentenced to 210 months of imprisonment followed by a lifetime of supervised release. App. A5.

C. The Ninth Circuit Proceedings

Petitioners filed a timely notice of appeal on March 26, 2007. The case was submitted on July 15, 2008. The Ninth Circuit affirmed the District Court's denial of the motion to dismiss for lack of jurisdiction. App., *infra*, App. A14.

In issuing their opinion the Court stated "we are bound by the Supreme Court's decision in *Raich*." *Gonzales v. Raich*, 545 U.S. 1 (2005). App. A6. *Raich* had overturned a previous Ninth Circuit decision[1] when the U.S. Supreme Court held that the Controlled Substances Act[2] ("CSA") was constitutional as applied to purely intrastate producers of marijuana for medical purposes under California's Compassionate Use Act.[3] *Raich*, 545 U.S. at 5.

Under the analysis in *Raich* this Court reiterated the general categories of activity Congress is empowered to regulate under the Commerce Clause focusing on "the power to regulate activities that substantially affect interstate commerce." U.S. Const., Art. I, §8, cl. 3; *Raich*, 545 U.S. at 16-17. App. A6-7. The Ninth Circuit focused on *Raich*'s determination that it was unnecessary to

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[1] *Raich v. Ashcroft* 352 F.3d 1222 (9th Cir. 2003).

[2] 84 Stat. 1242. Title 21 United States Code, section 801 *et seq.*

[3] California Health and Safety Code section 11362.5 (Compassionate Use Act of 1996.)

decide if a person's activities as a whole affected interstate commerce, "but only whether a 'rational basis' exists for so concluding." App. A7; citing *Raich*, 545 U.S. at 22; *United States v. Lopez*, 514 U.S. 549, 557 (1995).

The Ninth Circuit noted that the *Raich* court seemed to pay particular attention to the potential "gaping hole in the CSA" that a failure to regulate possession and manufacture of marijuana may create. *Raich*, 545 U.S. at 22. The Ninth Circuit then erroneously applied this logic to the possession or production of child pornography.

Citing the First Circuit, the Ninth Circuit held that "[g]iven Congress's broad interest in preventing sexual exploitation of children, it is eminently rational that Congress would seek to regulate intrastate production of pornography even where there is no evidence that it was created for commercial purposes" citing *United States v. Ortiz-Graulau*, 526 F.3d 16, 19 (1st Cir. 2008). App. A12.

Observing "it is rational to conclude that homegrown child pornography affects interstate commerce" because "child pornography begets more child pornography regardless of its origin," the Ninth Circuit reflected upon the legislative history of the Child Pornography Prevention Act and the various ills and desires child pornography purportedly causes. Pub.L. No. 104-208, § 121, 1996 HR 3610, 110 Stat. at 3009-27;

generally *United States v. Maxwell*, 446 F.3d 1210 (11th Cir. 2006). App. A12.

Finding rationality in Congress's reasoning, the Ninth Circuit determined they "need not inquire into the specifics of [McCalla's] possession: when a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual circumstances arising under that statue is of no consequence." App. A13, citing *United States v. Stewart*, 451 F.3d 1071, 1078 (9th Cir. 2006).

On September 24, 2008, the Ninth Circuit issued its opinion affirming the district court. The opinion was ordered to be published. The citation for the Ninth Circuit opinion is reported as *United States v. McCalla*, 545 F.3d 750 (9th Cir. 2008).

REASONS FOR GRANTING CERTIORARI

I. Review is Warranted Because the Ninth Circuit Erroneously Applied an Improper Legal Standard of Review of the Child Pornography Statute

When this Court issued *Gonzalez v. Raich* in 2005, it reversed the tide of recent Commerce Clause litigation. *Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195 (1995) [holding federal government has jurisdiction over wholly intrastate production of marijuana]. Prior to *Raich*, the trend of this Court had been to slowly begin reining in Congressional use of the Commerce Clause to pass laws affecting intrastate activities. See, e.g., *United States v. Lopez*, 514 U.S. 549, 557, 115 S.Ct. 1624, 131 L.ed.2d 626 (1995) (holding that the Gun-Free School Zones Act[4] was an invalid exercise of Congress' Commerce Clause authority); see also *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (striking the Violence Against Women Act[5]).

In *Morrison*, this Court established four factors to use in determining whether

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[4] Section 1702 Crime Control Act 1990, Pub.L. 101-647, Title 18 United States Code, section 922(q), Nov. 19, 1990.

[5] Title IV sec. 40001-40703 Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, Pub. L. 103-322, Sept. 13, 1994.

prohibiting an activity "exceed[s] Congress' authority under the Commerce Clause": whether (1) the conduct at issue is "economic" or part of "some sort of economic endeavor"; (2) the federal statute contains an "express jurisdictional element which might limit its reach to a discrete set of ... possessions that additionally have an explicit connection with or effect on interstate commerce"; (3) there are "express congressional findings regarding the effects upon interstate commerce" of the activity in question; and (4) "the link between [the activity] and a substantial effect on interstate commerce [i]s attenuated." *Morrison*, 529 U.S. at 609-13.

Although *Morrison* has never been overturned, some courts seem to be misconstruing these analyses when confronted with varying issues stemming from Congressional regulation of various items. In reaching its decision in this case, the Ninth Circuit did not address *Morrison* factors at all in their decision. *Ibid.*

More specifically, the Fourth Circuit found that "[a]lthough a jurisdictional element may establish that a given statute "is in pursuance of Congress' regulation of interstate commerce," *United States v. Morrison*, 529 U.S. 598, 612, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), an effective jurisdictional element is certainly not required where, as here, the statute directly regulates economic activity." *U.S. v. Forrest*, 429 F.3d 73, 77 fn.1 (2005).

In the wake of the *Raich* decision, the circuit courts have been forced to try to work within the perimeters of *Raich*. *Gonzalez v. Raich*, 545 U.S. 1, 125 S.Ct. 2195 (1995). While generally reaching the same conclusion, the courts are going about it in different ways leading to a great disparity between circuits. Those circuits that have cases on remand for this issue following *Raich* are reluctantly reversing mountains of prior decisions, often, for different rationales.

This is clearly demonstrated in the Eleventh Circuit in the remanded case of *United States v. Maxwell* where the court found, in its initial ruling, that there was no rational basis to conclude the defendant's conduct affected interstate commerce where police found computer discs containing images of child pornography but no proof of any specific interstate activity. *United States v. Maxwell*, 386 F.3d 1042 (11th Cir. 2004) (vacated and remanded). On remand, the court decided they were "now obligated to reverse course." *United States v. Maxwell*, 446 F.3d 1210, 1216 (11th Cir. 2006).

II. Review is Warranted Because the Ninth Circuit's Opinion is in Conflict with the Tenth Circuit

This relaxation of the of scrutiny of Congressional power under the Commerce Clause to the apparent level of the "rational basis" test as specifically applied to Californian medicinal marijuana in *Raich*, *supra*, now leads to more disparate treatment of these types of case. While the instant case relates to the lack of evidence of interstate transmission of child pornography, there remains the necessary federal jurisdictional element in this and every other federal case.

The Tenth Circuit has now, arguably, created a split among the circuits with its 2007 decision in *United States v. Schaefer* 501 F.3d 1197 (2007). In *Schaefer*, the defendant's conviction for possessing and receiving child pornography was overturned. The court found the Government had failed to prove the jurisdictional element required by 18 U.S.C. §2252 even though they were aware that Schaefer had obtained the images over the internet, used his credit cards to pay for child pornography websites and, in general, had used his computer to assist with these crimes. *Ibid.*

The Government attempted to support the defendant's conviction on precedent addressing Congress' authority to regulate purely intrastate activities, including child pornography. 501 F.3d 1197, 1201 fn. 7. citing *U.S. v. Jeronimo-Bautista*, 425 F.3d 1266

(10th Cir. 2005), *cert. denied* 547 U.S. 1069, 126 S.Ct. 1771, 164 L.Ed.2d 516 (2006); *Gonzalez v. Raich, supra.*[6]

The Tenth Circuit went on to hold that:

> "In answering the question whether a defendant's use of the Internet, without more, is sufficient proof of § 2252(a)'s jurisdictional nexus, we have not been able to draw upon a wealth of authority from other courts of appeals. Some circuits, however, have addressed the question or related ones. We recognize that, at least upon cursory inspection, this limited universe of circuit authority appears to uniformly reflect the view that Internet use is sufficient proof."

United States v. Schaefer, 501 F.3d 1197, 1203-1204.

Despite finding contrary authority, the Tenth Circuit held "that the jurisdictional language of §§ 2252(a)(2) and (a)(4)(B) unambiguously requires the movement across state lines of the statutorily-proscribed items. Thus, the district court committed clear and obvious error in finding Mr. Schaefer guilty

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[6] While Schaeffer did not challenge Congressional authority under the Commerce Clause, the jurisdictional challenge to his conviction was successful.

without evidence of such movement." 501 F.3d at 1207. The Tenth Circuit's review went further to find that there was no "Internet exception" to the statute's jurisdictional requirement. *Ibid* at 1205.

This ruling was also in direct contradiction to an earlier (2005) Tenth Circuit decision that held use of a camera made outside of the state was sufficient proof of interstate activity and the statutes could apply to purely intrastate production. *U.S. v. Jeronimo-Bautista*, 425 F.3d 1266 (2005). The Tenth Circuit has now raised the bar in *requiring* proof of an interstate travel element for a conviction under child pornography statutes.

This is one example of how the circuit courts are now in a seeming state of disarray as to how and when to apply the *Raich* analysis to child pornography cases. These issues- and this case in particular- are in dire need for this Court to bring clarity to the issue. The sheer volume of these cases on appeal for this very issue demonstrates the lack of standardized precedent and specific guidelines for district courts to follow in their courtrooms. The courts of appeals are struggling with this issue, employing different, mutually exclusive rationales, *ad hoc* analyses and a "patchwork quilt" approach to attempt to fashion some conformity.

This split in reasoning is causing a split in results where one person can act one way in one circuit and subsequently be sentenced to

several, or many, years in prison or another person act in exactly the same way, yet suffer none of the same consequences in another circuit. This is the mark of unfairness and injustice.

The reasoning split between the circuits in this critical component of Commerce Clause analysis- determining if the federal government has jurisdiction and what proof is actually necessary to prove jurisdiction- is clearly cast in the courts' respective decisions, is substantial in scope because of its often case-dispositive nature and it, therefore, ripe for resolution by this Court.

CONCLUSION

This Court should grant review.

Dated: December 22, 2008.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
GEOFFREY DAVID MCCALLA,
Defendant-Appellant

No. 07-50162.

Appeal from the United States District Court for the Central District of California at Los Angeles, No. CR 06-384 – Dale S. Fischer, District Judge

Submitted July 15, 2008.
Decided and Filed September 24, 2008

Before: SILVERMAN, RAWLINSON, and SMITH, JR. , Circuit Judges.

RAWLINSON, Circuit Judge:

Appellant Geoffrey David McCalla (McCalla) was charged in a two-count indictment with producing and possessing child pornography in violation of federal statutes. McCalla filed two motions to dismiss the indictment for lack of jurisdiction and the district court denied both. McCalla pled guilty to Count One charging production of child pornography, conditioned only upon his ability

to appeal the denial by the district court of his motion to dismiss under the Commerce Clause. On appeal, McCalla argues lack of federal jurisdiction under the Commerce Clause and lack of federal territorial jurisdiction under 18 U.S.C. § 7. We have jurisdiction under 28 U.S.C. § 1291, and we affirm the district court's rulings on both motions to dismiss.

I. BACKGROUND

In December, 2005, John B. Kuzma (Kuzma), Special Agent with the Department of Homeland Security (DHS), United States Immigration and Customs Enforcement (ICE), began investigating McCalla's possible use of a child pornography website. In the course of his investigation, Kuzma learned that McCalla had been arrested by the Los Angeles Police Department (LAPD) after a witness reported discovering images in McCalla's house depicting child pornography.

The images showed the witness's step-daughter (Child Victim 1), who appeared to be approximately five years old, as well as other children, engaging in sexually explicit conduct. In addition to these images, numerous other images depicting child pornography were retrieved from materials seized during a search of McCalla's residence and place of employment. Approximately 4,235 suspected child pornography images were recovered from standard file directories in McCalla's work computer's hard drive.

Approximately 50 suspected child pornography movie files were also recovered.

Following his arrest and the discovery of these images, a federal grand jury returned a two-count indictment against McCalla. Count One charged McCalla with the production of child pornography in violation of 18 U.S.C. § 2251(a), (e). Count Two charged McCalla with possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). Id. at 13. Both counts included the jurisdictional requirement that the child pornography produced or possessed by McCalla was "produced using materials that had been mailed, shipped, and transported in interstate and foreign commerce by any means, including by computer ..."

McCalla filed two motions to dismiss the indictment. In the first motion, McCalla argued lack of subject matter jurisdiction, specifically contending that the Commerce Clause did not grant Congress authority to regulate local production of child pornography. The district court rejected this argument, noting that in light of the Supreme Court's decision in *Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1, (2005), regardless of prior Ninth Circuit rulings, "the Ninth Circuit would now take the position that this statute was valid."

McCalla filed a subsequent motion to dismiss, arguing the absence of federal

territorial jurisdiction because the events did not occur within the exclusive territory of the United States. The district court also denied this second motion.

Thereafter, McCalla entered into a conditional plea agreement with the government whereby he pled guilty to Count 1 of the indictment (production of child pornography). The plea agreement was conditioned upon McCalla's reservation of the right to seek appellate review of the district court's denial of the motion to dismiss "filed on or about August 11, 2006[the Commerce Clause argument]."

In the plea agreement, the parties stipulated to several facts, including:

- Beginning in or around January, 2003, and continuing to in or about September, 2004, McCalla took approximately 45 sexually explicit photographs of Child Victim 1.

- McCalla produced the pornographic images of this child using materials that had been mailed, shipped, or transported in interstate or foreign commerce. In particular, McCalla used a Sony digital camera that had been manufactured in Japan and transported in interstate and foreign commerce to California.

- Two compact discs containing child pornography that McCalla kept and used at home contained child pornographic images of Child Victim 1.

- Three compact discs containing child pornography that McCalla kept and used at work contained child pornographic images of Child Victim 1.

The district court accepted the guilty plea, and sentenced McCalla to 210 months' imprisonment followed by a lifetime of supervised release. McCalla timely appealed.

II. STANDARD OF REVIEW

"We review a district court's denial of a motion to dismiss an indictment on constitutional grounds de novo." *United States v. Latu*, 479 F.3d 1153, 1155 (9th Cir.2007) (citation omitted).

III. DISCUSSION

A. Commerce Clause Challenge

McCalla argues that Congress lacks authority under the Commerce Clause to regulate the noncommercial and wholly intrastate production of child pornography, and therefore, as applied to him, 18 U.S.C. § 2251(a) is unconstitutional.

McCalla makes two main arguments in support of his claim. First, McCalla argues that the Supreme Court's most recent decision discussing the Commerce Clause, *Gonzales v. Raich,* 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005), was wrongly decided and applies an incorrect legal standard of review. Second, McCalla argues that analyzing Section 2251(a) utilizing the factors articulated by the Supreme Court in *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), reveals the statute's unconstitutionality.

To the extent McCalla premises his argument on an invitation to set aside or disregard United States Supreme Court precedent, we simply cannot accommodate him. As the Supreme Court has expressly stated, "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan,* 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997). Accordingly, in determining whether prosecution of the intrastate production of child pornography is authorized under the Commerce Clause, we are bound by the Supreme Court's decision in *Raich.*

Raich addressed the question of whether the Controlled Substances Act (CSA) was unconstitutional as applied to purely intrastate producers of marijuana for medical purposes under California's Compassionate Use Act. 545 U.S. at 5, 125 S.Ct. 2195.

The Supreme Court reiterated that there are three general categories of activity that Congress's commerce power gives it the authority to regulate. "First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce." *Id.* at 16-17, 125 S.Ct. 2195 (citations omitted). It is this third category that was implicated in *Raich*, see *id.* at 17, 125 S.Ct. 2195, and which also is at issue in this case.

The Supreme Court ultimately held that the application of CSA provisions criminalizing the intrastate manufacture, distribution or possession of marijuana did not violate the Commerce Clause. *Id.* at 9, 125 S.Ct. 2195.In reaching this holding, the *Raich* court established several important principles that guide our decision. First, the Court reiterated that "[i]n assessing the scope of Congress' authority under the Commerce Clause, ... the task before [the Court] is a modest one.[The Court] need not determine whether respondent[ ]'s activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.* at 22, 125 S.Ct. 2195, citing *United States v. Lopez*, 514 U.S. 549, 557, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (emphasis added) (parallel citation

omitted).

Second, in *Raich*, the Court reasoned that "[g]iven the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere ..., and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA." *Id.* (citation and footnote reference omitted).

Third, the Court emphasized, "[t]hat the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme." *Id.*

In reaching its holding that application of the CSA to purely intrastate production of marijuana was within Congress' authority under the Commerce Clause, the Supreme Court distinguished the CSA from those statutes that it struck as unconstitutional in *Lopez* (holding that the Gun-Free School Zones Act was an invalid exercise of Congress' Commerce Clause authority) and *Morrison* (striking the Violence Against Women Act). The Court distinguished *Raich* from *Lopez* and *Morrison* in part based on the fact that in those cases, the statutes in question had no

connection to commerce or economic enterprise. *Raich*, 545 U.S. at 23-25, 125 S.Ct. 2195. In contrast, the CSA is "a comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances' " most of which "have a useful and legitimate medical purpose ..." *Id.* at 24, 125 S.Ct. 2195. "The regulatory scheme is designed to foster the beneficial use of those medications, to prevent their misuse, and to prohibit entirely the possession or use of substances listed in Schedule I, except as a part of a strictly controlled research project." *Id.*

The Supreme Court emphasized that "[u]nlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. 'Economics' refers to 'the production, distribution, and consumption of commodities.' " *Id.* at 25, 125 S.Ct. 2195 (citation omitted). The court noted that "[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product." *Id.* at 26, 125 S.Ct. 2195 (footnote reference omitted). The Court concluded that "[b]ecause the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality." Id.

Fourth and finally, the *Raich* Court rejected the appellants' argument that the

cultivation of homegrown medical marijuana represented a " 'separate and distinct' class of activities ... beyond the reach of federal power." *Id.* The Court determined that not only was this purported class not exempt from inclusion in the CSA, but it was "an essential part of the larger regulatory scheme." *Id.* at 26-27, 125 S.Ct. 2195.

The Supreme Court's reasoning in *Raich* supports a conclusion that the challenged statute in this case is not unconstitutional because it criminalizes the production of "homegrown" child pornography. Here, as in *Raich,* the statute is comprehensive in that it seeks to regulate (more accurately, exterminate) the entire child pornography market (similar to at least one category of the CSA-marijuana). See *United States v. Maxwell,* 446 F.3d 1210, 1217 n. 7 (11th Cir.2006). Moreover, as in *Raich,* the statute addresses a commodity-child pornography-which, Congress found, "[has] become [a] highly organized, multimillion dollar industr[y] that operate[s] on a nationwide scale." S.Rep. No. 95-438, at 5 (1977), reprinted in 1978 U.S.C.C.A.N. 40, 42, 1977 WL 9660.

Following the reasoning in *Raich,* the task before us then is to determine "whether Congress could rationally conclude that the cumulative effect of the conduct by[McCalla] and his ilk would substantially affect interstate commerce-specifically the interstate

commerce Congress is seeking to eliminate." *Maxwell,* 446 F.3d at 1218. As the Eleventh Circuit in *Maxwell* concluded, "[v]iewed in this light, there is nothing irrational about Congress's conclusion, supported by its findings, that pornography begets pornography, regardless of its origin." *Id.*

Other circuits considering this issue post- *Raich* have agreed. The Fourth Circuit noted that "[j]ust as Congress rationally concluded that demand might draw homegrown marijuana into interstate markets, thereby 'frustrating the federal interest in eliminating commercial transactions in the interstate market in their entirety,' so too might Congress rationally fear that homemade child pornography would find its way into interstate commerce." *United States v. Forrest,* 429 F.3d 73, 78 (4th Cir.2005), quoting *Raich,* 545 U.S. at 19, 125 S.Ct. 2195 (alteration omitted); see also *United States v. Chambers,* 441 F.3d 438, 442, 454-55 (6th Cir.2006) (rejecting an as applied challenge to § 2252, prohibiting transportation of child pornography); *United States v. Blum,* 534 F.3d 608, 609, 611 (7th Cir.2008) (upholding § 2251, noting that "Congress in enacting [§ 2251] recognized the danger posed by any child pornography regardless of origin ..."); *United States v. Mugan,* 441 F.3d 622, 629-30 (8th Cir.2006) (reaching same conclusion without citing *Raich*); *United States v. Jeronimo-Bautista,* 425 F.3d 1266, 1272-73 (10th Cir.2005)

(upholding constitutionality of § 2251 as applied to purely intrastate production); *United States v. Sullivan,* 451 F.3d 884, 890 (D.C.Cir.2006) (upholding constitutionality of child pornography possession statute).

Given Congress's broad interest in preventing sexual exploitation of children, it is eminently rational that Congress would seek to regulate intrastate production of pornography even where there is no evidence that it was created for commercial purposes. See *United States v. Ortiz-Graulau,* 526 F.3d 16, 19 (1st Cir.2008) ("[P]reventing exploitation of children could be aided by the statute's broad ban on taking such photographs even for private use.") (citation omitted). Indeed, in enacting the Child Pornography Prevention Act, Congress specifically expressed the idea echoed by the 11th Circuit in *Maxwell* that child pornography begets more child pornography regardless of its origin: "the existence of and traffic in child pornographic images ... inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials ..."Pub.L. No. 104-208, § 121, 1996 HR 3610, 110 Stat. at 3009-27.

Because it is rational to conclude that homegrown child pornography affects interstate commerce, we "need not inquire into the specifics of [McCalla's] possession: when a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *United States v. Stewart*, 451 F.3d 1071, 1078 (9th Cir.2006) (citation, alteration and internal quotation marks omitted).

McCalla's reliance on our decision in *United States v. McCoy*, 323 F.3d 1114, 1117 (9th Cir.2003), a case in which we found unconstitutional the application of § 2252 to a mother who possessed a single photograph in which she and her child appeared partially nude, is misplaced. *McCoy* involved possession of child pornography, rather than its production. Moreover, to the extent the reasoning employed in *McCoy* relied on the local nature of the activity, it has been overruled by the Supreme Court's decision in *Raich*. See *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir.2003) (en banc) ("We hold that the issues decided by the higher court need not be identical in order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.").

Because McCalla's Commerce Clause arguments are unavailing, we affirm the district court's denial of McCalla's motion to dismiss on this basis.

B. Territorial Jurisdiction

Citing 18 U.S.C. § 7, McCalla raises the argument that federal courts are without jurisdiction over matters that do not occur exclusively in federal territory. This argument is wholly without merit. The federal court's jurisdiction is not limited to federal crimes committed on federal lands. Pursuant to 18 U.S.C. § 3231, "[t]he district courts of the United States have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." (Emphasis added). See also *United States v. Begay*, 42 F.3d 486, 499 (9th Cir.1994) (holding that where situs is not an element of the offense, federal criminal statutes apply "equally to everyone everywhere within the United States").

IV. CONCLUSION

Regulation of intrastate production of child pornography within the context of eliminating the national child pornography industry is a valid exercise of Congress's authority under the Commerce Clause. Application of this statute to McCalla was not unconstitutional. Jurisdiction to enforce § 2251(a) is not limited to federal enclaves as

argued by McCalla. Accordingly, we uphold the district court's denials of both motions to dismiss the indictment.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES

UNITED STATES OF AMERICA,	)	
	)	
	)	No. CR 06-384
Plaintiff,	)	
	)	
v.	)	JUDGMENT
	)	
	)	
GEOFFREY DAVID McCALLA,	)	
	)	
	)	
Defendant	)	

In the presence of the attorney for the government, the defendant appeared in person on this date. [Month 03, Day 26, Year 2007] WITH COUNSEL Dmitry Gurovitch [on a plea of] GUILTY, and the court being satisfied that there is a factual basis for the plea. There being a finding of GUILTY, defendant has been convicted as charged of the offense(s) of:

18:2251(a),(e): Sexual Exploitation of Children (Count 1 of the Indictment) Class B Felony

The court asked whether there was any reason why judgment should not be imposed.

Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court ordered that: Pursuant to eh Sentencing Reform Act of 1984, the Defendant is committed to the custody of the Bureau of Prisons to be imprisoned for a term of:

201 months. Upon release from imprisonment, the defendant shall be placed on supervised release for a lifetime term under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the U.S. Probation Office and General Order 318;
2. During the period of community supervision the defendant shall pay the special assessment and restitution in accordance with this judgment's orders pertaining to such payment;
3. The defendant shall cooperate in the collection of a DNA sample from the defendant;

Drug Treatment

4. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight tests per month, as directed by the Probation Officer.
5. The defendant shall participate in an outpatient substance abuse treatment and counseling program that includes urinalysis, saliva and/or sweat patch testing, as directed by the Probation Officer. The defendant shall

abstain from using illicit drugs and alcohol, and abusing prescription medications during the period of supervision;

6. During the course of supervision, the Probation Officer, with the agreement of the defendant and defense counsel, may place the defendant in a residential drug treatment program approved by the United States Probation Office for treatment of narcotic addiction or drug dependency, which may include counseling and testing, to determine if the defendant has reverted to the use of drugs, and the defendant shall reside in the treatment program until discharged by the Program Director and the Probation Officer;

7. As directed by the Probation Officer, the defendant shall pay all or part of the costs of treating defendant's drug dependency to the aftercare contractor during the period of community supervision, pursuant to 18 U.S.C. § 3672. The defendant shall provide payment and proof of payment as directed by the Probation Officer.

8. The defendant shall register with the state sex offender registration agency in any state where the defendant resides, is employed, carries on a vocation, or is a student, as directed by the Probation Officer. The defendant shall provide proof of registration to the Probation Officer within 15 days of release from imprisonment;

9. The defendant shall participate in a psychological/psychiatric counseling and/or sex offender treatment program, which shall include inpatient treatment, as approved and directed by the Probation Officer, The

defendant shall abide by all rules, requirements, and conditions, of such program, including submission to risk assessment evaluation(s), and physiological testing, such as polygraph and Abel testing;

10. As directed by the Probation Officer, the defendant shall pay all or part of the costs of treating the defendant's psychological/psychiatric disorder(s) to the aftercare contractor during the period of community supervision, pursuant to 18 U.S.C. § 3672. The defendant shall provide payment and proof of payment, as directed by the Probation Officer;
11. The defendant shall not possess any materials, including pictures, photographs, books, writings, drawings, videos, or video games, depicting and/or describing "sexually explicit conduct," as defined in 18 U.S.C. § 2256(2)
12. The defendant shall not possess any materials, including pictures, photographs, books, writings, drawings, videos, or video games, depicting and/or describing child pornography, as defined in 18 U.S.C. § 2256(8);
13. The defendant's employment shall be approved by the Probation Officer, and any changes in employment must be pre-approved by the Probation Officer. The defendant shall submit the name and address of the proposed employer to the Probation Officer at least 10 days prior to any schedule change;
14. The defendant shall use only those computers and computer-related devices, screen user names, passwords, email accounts, and

internet service providers (ISPs), as approved by the Probation Officer. Computers and computer related devices include, but are not limited to, personal computers, personal data assistants (PDAs), internet appliances, electronic games, and cellular telephones, as well as their peripheral equipment, that can access, of can be modified to access, the internet, electronic bulletin boards, and other computers, or similar media;

15. All computers, computer-related devices, and their peripheral equipment, used by the defendant, shall be subject to search and seizure and the installation of search and/or monitoring software and/or hardware, including unannounced seizure for the purpose of the search. The defendant shall not add, remove, upgrade, update, reinstall, repair, or otherwise modify the hardware or software on the computers, computer-relayed devices, or their peripheral equipment, nor shall he hide or encrypt files or data without prior approval of the Probation Officer. Further the defendant shall provide all billing records, including telephone, cable, internet, satellite, and the like, as requested by the Probation Officer;
16. The defendant shall not access via computer any material that relates to child pornography. The defendant shall not have another individual access the internet on his behalf to obtain files or information which he has been restricted from accessing, or accept restricted files or other information from another person.
17. The defendant shall use computers/devices

only within the scope of his employment. The defendant shall not access a computer for any other purpose. The defendant shall immediately report any changes at his place of employment in regard to internet access and computer use, including but not limited to, his internet email;

18. The defendant shall not possess or use a computer with access to any online services at any location (including his place of employment), without the prior approval of the Probation Officer. This includes access through any internet service provider, bulleting board system, or any public or private computer network system. The defendant shall not have another individual access the internet on his behalf to obtain files or information which he has been restricted from accessing himself, or accept restricted files or information from another person.

The Court authorizes the Probation Office to disclose the Presentence Report, and/or any previous mental health evaluations or reports, to the treatment provider. The treatment provider may provide information (excluding the Presentence Report), to State or local social service agencies (such as the State of California, Department of Social Services), for the purpose of the defendant's rehabilitation.

It is ordered that the defendant shall pay to the United States a special assessment of $100, which is due immediately.

Pursuant to 18 U.S.C. § 3664(d)(5), the determination of restitution is deferred until JUNE

20th, 2007. An Amended Judgment will be entered after such determination.

The defendant shall comply with General Order No 01-05.

The Court grants the government's oral motion to dismiss the underlying complaint and Count 2 of the Indictment.
The Court advises the defendant of his limited right to appeal this judgment.
In addition to the special conditions of supervision imposed above, it is hereby ordered that he Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

3/28/07 — /s/ Dale S. Fischer,
Date — United States District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the Marshal or other qualified officer.

Sherri R. Carter, Clerk

3/28/07 — /s/ Paul Pierson
Filed Date — Deputy Clerk